80-959

No. _____

Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1980

STATE OF OHIO,
Petitioner,

vs.

GARY EVERETT THOMPSON

and

MYRON LESTER TILTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals for the Fifth Appellate District of Ohio

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QUESTION PRESENTED

Whether the mere fact that one of two defense attorneys representing respondents in an aggravated murder prosecution also represented, both before and after trial, a minor State's witness who gave no testimony implicating respondents in the crime, and additionally had declined to represent a co-defendant per se creates a conflict of interest denying respondents effective assistance of counsel.

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STATE OF OHIO,
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Ohio, by the Prosecuting Attorney for Stark County and Assistant Prosecuting Attorney for Stark County pray that a Writ of Certiorari issue to review the judgment heretofore entered by the Court of Appeals for the Fifth Appellate District for Stark County, Ohio.

OPINION BELOW

The Court of Common Pleas for Stark County, Ohio rendered an opinion, a copy of which is attached hereto and marked Appendix B. The unreported opinion of the Court of Appeals for the Fifth Appellate District for Stark County, Ohio, is attached hereto and marked Appendix A. The Supreme Court of Ohio rendered no opinion, but dismissed the motion of Petitioner for leave to appeal by Judgment entry dated September 26, 1980, a copy of which is attached hereto and marked Appendix C.

JURISDICTION

The Supreme Court of Ohio dismissed Petitioner's Motion for leave to appeal as set forth in Appendix C. The jurisdiction of this court is respectfully invoked pursuant to the provisions of Title 28, United States Code, §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents, Myron Lester Tilton and Gary Everett Thompson were indicted along with others for Aggravated Murder with specifications of aggravation arising from the death of three Massillon, Ohio firemen during the aggravated arson of a restaurant structure in Stark County, Ohio which occurred on November 30, 1975.

At the specific instance and request of respondents' Attorney, Harry Schmuck of Canton, Ohio, was appointed by the trial court at arraignment to represent them along with Attorney Tom A. Borcoman, Public Defender for Stark County. Respondents waived trial by jury and stood trial before a three-judge panel which found them guilty as charged and sentenced each to Life Imprisonment.

Attorney Ralph W. Ross of Canton, Ohio entered the proceedings on behalf of respondents and along with Attorney Borcoman filed a Motion for new trial. The trial court conducted a hearing on the Motion which addressed itself to a claim of ineffective assistance of counsel in that Attorney Harry Schmuck had represented an individual who became a minor witness in the Petitioner's trial. This witness, one George Bevington, had sold the gasoline used in the arson fire to a co-indicted defendant, one Fred Dalesandro, but had no contact at any time with respondents and gave no testimony bearing directly upon their participation in the alleged offense. The motion for new trial was overruled and respondents filed a timely appeal to the Fifth District Court of Appeals alleging along with other error in their Fourth Assignment:

> "The Defendant-Appellants state that their rights under the Sixth Amendment and Fourteenth Amendment of the United States Constitution were violated wherein they were deprived of the effective assistance

of counsel during the trial of this matter in that chief counsel appointed by the Common Pleas Court of Stark County, Ohio had a conflict of interest in that said chief counsel represented State's witness George Bevington, prior to the trial, during the trial, and after the trial, all in violation of the Defendant-Appellants' rights."

The Court of Appeals discussed this assignment of error at length and determined that there was no conflict of interest prejudicial to the Respondents and overruled the Assignment of Error. The Court likewise overruled other assigned errors and affirmed the judgments of conviction. Respondents then filed a Motion for Leave to Appeal to the Supreme Court of Ohio which leave was denied by that Court. Respondents then filed a Petition for Writ of Certiorari to this Court which was likewise denied and subsequently on or about July 5, 1978 filed a Petition for Post-Conviction Relief in the trial court pursuant to Section 2953.21 of the Ohio Revised Code. This petition raised the same claim of ineffective assistance of counsel by reason of a conflict of interest which was raised in the motion for new trial, direct appeal to the Court of Appeals, the Supreme Court of Ohio and upon Writ of Certiorari to this Court.

The Court of Common Pleas made written Findings of Fact and Conclusions of Law which were filed on July 18, 1978 finding the issue res judicata under the authority of the Ohio Supreme Court's decision in *State v. Hester*, 45 Ohio St. 2d 71 and dismissed the petition. Respondents filed a timely notice of appeal from that judgment with the Fifth District Court of Appeals which upon review held that res judicata did not apply to the effective assistance of counsel claim and ordered the proceedings remanded to the Court of Common Pleas for an evidentiary

hearing. An evidentiary hearing on the post-conviction petition was conducted before the Honorable Robert E. Cook, Judge of the Eleventh Appellate District, sitting in Stark County by assignment, who after hearing all the evidence, filed written Findings of Fact and Conclusions of Law (Appendix B), determined that there was no conflict of interest and dismissed the petition. Respondents thereafter filed a timely notice of appeal to the Fifth District Court of Appeals from the judgment of the trial court overruling the petition for post-conviction relief. This cause was argued before three judges of the Sixth District Court of Appeals sitting on assignment, who on June 11, 1980 filed an Opinion and Judgment Entry (Appendix A) reversing the judgment of the Court of Common Pleas remanding this cause to such court for a new trial. A timely notice of appeal from this judgment was filed to the Supreme Court of Ohio on July 9, 1980 and leave to appeal was denied by such court on September 26, 1980 (Appendix C). A motion for re-hearing was timely filed and denied by that court on November 7, 1980.

REASON FOR GRANTING WRIT

THE RULING OF THE FIFTH DISTRICT COURT OF APPEALS REFLECTED A MISCONSTRUCTION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THIS COURT'S OPINION IN CUYLER V. SULLIVAN, 48 U.S.L.W. 4517 AS WELL AS OPINIONS OF THE OHIO SUPREME COURT CONSISTENT WITH CUYLER, SUPRA.

The trial judge in the post-conviction evidentiary hearing applied the test established by the Supreme Court of Ohio in *State v. Lytle,* 48 Ohio St. 2d 391. In *Lytle,*

the Ohio Supreme Court rejected application of the A.B.A. Standards for effective assistance of counsel as not constituting the law of Ohio (48 Ohio St. 2d 396) and also rejected the "best available practice" standard opting instead for the requirements set forth in *Beasly v. U.S.*, 491 F.2d 687 in which the Sixth Circuit Court of Appeals defined the right to counsel to include no more nor less than "reasonably effective assistance". The Ohio Supreme Court also noted the presumption of competence of licensed attorneys set forth in its opinion in *Vaughn v. Maxwell*, 2 Ohio St. 2d 299 and the heavy burden to overcome that presumption. Subsequent to *Lytle, supra,* the Ohio Supreme Court established a two-step process for applying the criteria set forth above, stating that the defendant must initially demonstrate a "substantial" violation of an essential duty by counsel and then demonstrate prejudice arising therefrom. *State v. Nabozny,* 54 Ohio St. 2d 195 (1978). Most of the conflict of interest cases cited by the respondents in the courts below involved "dual representation" by an attorney of two defendants in the trial of their common cause. In the instant case George Bevington, a minor State's witness, who had previously been represented by Mr. Schmuck, was never a defendant, and Mr. Schmuck did not represent him at the time of respondents' trial. Furthermore, this Court has never held that joint representation per se is violative of a defendant's rights and Ohio Courts have likewise rejected that concept, *State v. Oliver,* 23 Ohio App. 2d 210.

The Court of Appeals discarded the guidelines established by the Supreme Court of Ohio and by this Court relying instead on it own interpretation of *Glasser v. U.S.*, 315 U.S. 60 (1942) and *Cuyler v. Sullivan,* 48 U.S.L.W. 4517. The quoted portion of *Cuyler* referred in the Court of Appeals Opinion is at odds with this decision. In *Cuyler, supra,* this Court stated:

> "But until defendant shows his counsel *actively* represented conflicting interest he has not established the constitutional predicate for his claim of ineffective assistance." *Cuyler, supra,* at page 4521 (Emphasis added).

In his Findings of Fact and Conclusions of Law in the Court of Common Pleas, his Honor Judge Cook stated:

> "Based upon the facts and laws set forth above, this Court concludes that the petitioners have not carried the burden of proof that Attorney Harry W. Schmuck violated any essential duty to his clients, the petitioners."

Going on to state:

> "In accordance with State v. Hester, 45 O.S. 2d 71, this Court concludes that petitioners had a fair trial, substantial justice was done, therefore the Court concludes that they had effective assistance of counsel." (Appendix B, page A17)

After hearing the testimony and with the opportunity to judge the candor of the witnesses, Judge Cook determined that:

> "Prior to trial, Schmuck discussed Bevington's expected testimony in the presence of Tilton and Thompson. They knew that Schmuck knew Bevington and what he would say as a witness. Bevington testified at the trial of Tilton and Thompson for the State of Ohio. His testimony was about how he sold the gasoline to Dalesandro. He did not testify as to any involvement of Tilton and Thompson in setting the LaCuisina fire. Schmuck cross-examined Bevington at trial. His cross-examination was limited to the area of Bevington's sale of the gasoline to Dalesandro." Appendix B at page A14)

He further noted:

> "At the time of Attorney Schmuck's appointment by the Court to represent the petitioners, his relationship to George Bevington did not constitute a conflict of interest as to representing petitioners. Bevington was not a client of his at the time Schmuck was appointed, at their request, to represent petitioners." (Appendix B at page A16)

The Fifth District Court of Appeals overruled an assignment of error by the respondents to the effect that the Trial Court's Findings of Fact were in error stating:

> "Upon our review of the record of the evidentiary hearing we find the Findings of Fact complained of by the appellant are not against the manifest weight of the evidence. These findings of fact are supported by some competent, credible evidence." (Opinion Appendix A, page A6)

The entire voluminous transcript of respondents' trial was introduced in post-conviction hearing (R-248). The entire testimony, both direct and cross-examination of George Bevington covered only ten pages of this expansive record and it is clear that when the test established by the Supreme Court of Ohio and by this Court in *Cuyler v. Sullivan, supra,* is applied and the entire record considered, Bevington's testimony was at best trivial.

In the post-conviction hearing, Bevington testified that his only knowledge about the arson came from a discussion with Fred Dalesandro who admitted his part, but said nothing of any other individuals involved (R-131). No one to this date, including the respondents, dispute that Dalesandro was an arsonist and that he obtained the gasoline that he had used in the LaCuisina fire from George Bevington.

Viewed in the light most favorable to the respondents the most that can be said is that Harry Schmuck's association with George Bevington prior to undertaking the defense of Thompson and Tilton made him privy to information helpful in their defense. It in no way prejudiced the respondents. In the post-conviction hearing, Mr. Schmuck testified that he cross-examined Mr. Bevington at trial:

> "Because I knew the information that he had and I tried to make it in the best light available for Thompson and Tilton (R-143)."

Mr. Schmuck's trial cross-examination of Bevington as reflected by the record demonstrates that he effectively showed that Bevington dealt only with Fred Dalesandro, furnished the gasoline to Fred Dalesandro and thereby neutralized Bevington insofar as his ability to furnish any evidence linking the respondents with the crime with which they were charged. This is a frequently used and recognized defense tactic.

As stated by Mr. Schmuck in the evidentiary hearing, the two most important witnesses in the murder case against Tilton and Thompson were Mike Scott and Fred Dalesandro (R-151). It was Dalesandro and Scott who pointed the finger at Thompson and Tilton (R-164-165) and respondents Thompson and Tilton were aware of Mr. Schmuck's acquaintance with George Bevington prior to trial and he shared with them the substance of what George Bevington would testify to (R-169).

As far as any conflict of interest concerning Dalesandro, the trial testimony demonstrated only that Mr. Schmuck simply refused to represent Mr. Dalesandro. This surely gives rise to no conflict of interest.

The trial court's conclusion that no conflict of interest existed at the time Mr. Schmuck represented the respon-

dents is supported in part by a question posed by the Judge to Mr. Schmuck during the evidentiary hearing. The following appears at page 170 of the record:

> THE COURT: "Before we go to re-direct Mr. Ross, let me make sure. There have been several references here to whether you were or weren't the attorney of Mr. Bevington and of course, then later when you disclosed that relationship, etc., and so on. Now for what it's worth from the time the statement given to you by Mr. Bevington in your office until I believe there has been testimony about a lawsuit filed by the widows of the three firemen in which you represented Mr. Bevington, were you retained during that period of time by Mr. Bevington to represent him in any legal actions or consulted by him with reference to any legal actions?
>
> ANSWER: No, sir, not that I know of."

Despite the fact that Judge Cook permitted Mr. Ross to cross-examine and attempt to impeach his own witness over the State's objection, the witness was not impeached on this issue and this testimony supports Judge Cook's conclusions set forth in the Opinion (Appendix B, page A16) that:

> "Nothing in the record indicates violation of any defense counsel's essential duties to his client."

In *Cuyler v. Sullivan, supra,* this Court held that a mere possibility that counsel's multiple representation of criminal defendants created a conflict of interest was insufficient to establish a violation of the Sixth Amendment right to counsel. The record in the instant case discloses no more than a possibility of conflict. The Court of Appeals improperly implied the test of *Cuyler, supra,* and should be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Judgment Entry and Opinion of the Court of Appeals For the Fifth Appellate District of Ohio

(Filed June 11, 1980)

No. 5171

IN THE COURT OF APPEALS OF STARK COUNTY

STATE OF OHIO,
Appellee

vs.

GARY THOMPSON and MYRON TILTON,
Appellants

JUDGMENT ENTRY

For the reasons stated in the memorandum opinion on file, the judgment of the court of common pleas is reversed, the convictions and sentences of each of the appellants are vacated and these causes are remanded to the Court of Common Pleas of Stark County for further proceedings according to law.

/s/ JOHN W. POTTER
Presiding Judge

JOHN W. POTTER
CLIFFORD F. BROWN and
JOHN J. CONNORS, JR., JJ.
concur.

No. 5171

IN THE COURT OF APPEALS OF STARK COUNTY, OHIO

STATE OF OHIO,
Respondent-Appellee,

v.

GARY THOMPSON and MYRON TILTON,
Petitioners-Appellants

MEMORANDUM OPINION

PER CURIAM. This appeal is from a judgment entry filed August 15, 1977, in which defendants-appellants Myron Lester Tilton and Gary Everett Thompson were denied post-conviction relief. The issue raised by defendants in their post-conviction relief petition is the denial of effective assistance of counsel at their trial in that, without defendants' knowledge, one of their defense attorneys had a conflict of interest in regard to two prosecution witnesses. This court, in an opinion filed December 18, 1978, reversed the trial court's denial of the post-conviction relief petition and ordered a full evidentiary hearing on this issue. After an evidentiary hearing, defendants' petition for post-conviction relief was again denied and defendants took this appeal.

Defendants were both convicted of three counts of aggravated murder by a three-judge panel. An explosion and fire which killed three firemen occurred at the La-Cuisina Restaurant in Massillon, Ohio, on November 30, 1975. Defendants allegedly set this fire with the knowledge of the restaurant's owner, Louis Battista and his

manager, Joseph Paone, since business was bad at the restaurant and Battista wanted to collect the fire insurance. According to testimony at the defendants' trial, the fire was set using plastic jugs filled with gasoline, with newspapers being used as fuses. The use of the gasoline to set the fire caused the explosion.

Defendants were represented at trial by two attorneys, Harry Schmuck and Tom Borcoman. Schmuck, who allegedly had the conflict of interest, was in private practice and had practiced law for over thirty years. At the time of the trial, defendants requested Schmuck be appointed to represent them. Tom Borcoman was employed by the Stark County Public Defender's Office and had practiced law for a year and a half at the time of the trial.

Two of the prosecution witnesses at trial had a previous relationship with Schmuck. One of these witnesses, Fred Dalesandro, had approached Mr. Schmuck to represent him in this same case, but was unable to pay the retainer Mr. Schmuck requested. Dalesandro testified at trial that the defendants aided him in setting the fire. Dalesandro also testified to his contacts with the defendants prior to the fire to make preparations to set the fire and his contact with the defendants after the fire to dispose of certain evidence related to the fire. Delasandro was the principal prosecution witness to testify against defendants and was cross-examined by Mr. Borcoman.

The other witness with whom Mr. Schmuck had a prior relationship is George Bevington. Bevington testified at trial to buying gasoline in plastic jugs at a service station at Fred Dalesandro's request. Mr. Dalesandro testified to using this gasoline to start the LaCuisina fire. None of Mr. Bevington's testimony directly implicated the defendants in the LaCuisina fire.

Mr. Schmuck had handled various legal matters for Mr. Bevington prior to the LaCuisina fire. Bevington approached Schmuck several days after the fire and told Schmuck about his actions in getting the gasoline for Delesandro. Schmuck arranged for Bevington to talk with one of the Stark County prosecutors, James Unger, and other police officials in Schmuck's office. Schmuck was present during this conversation. Bevington was never charged with any crime for his involvement in the LaCuisina fire. Bevington was cross-examined at the defendants' trial by Mr. Schmuck. Unger was one of the prosecutors at the defendants' trial. Schmuck also represented Bevington in a latter wrongful death action brought by the widows of the firemen killed in the LaCuisina fire against Bevington and Delesandro. Schmuck was able to have Bevington dismissed as a defendant in this action.

Testimony at the evidentiary hearing on the post-conviction relief petition revealed neither defendant was aware of Schmuck's relationship with either Delesandro or Bevington at the time of the trial. Both defendants stated they would not have wished to have Schmuck represent them if they had known of these relationships. Schmuck's testimony did not contradict that of the defendants, although there is some indication that Schmuck may have told the defendants prior to trial that Bevington would testify at their trial, and the substance of his testimony, despite the fact Bevington was omitted from the prosecutor's list of witnesses. Myron Tilton also testified that Schmuck told him Schmuck would cross examine Dalesandro at trial.

Tom Borcoman testified at the evidentiary hearing to having no knowledge of the extent of Schmuck's relationship with Bevington, although he did recall Schmuck discussing Bevington's testimony with the defendants prior

to trial. Borcoman could not recall Schmuck telling him how Schmuck had gotten this information. Borcoman also testified that he had cross examined Dalesandro at Schmuck's suggestion since Schmuck said he had some type of relationship with Dalesandro.

James Unger, one of the prosecutors at the defendant's trial, testified at the evidentiary hearing on post-conviction relief. Unger had knowledge of Bevington's contacts with Schmuck since Unger was present when Bevington's statement was taken in Schmuck's office. Unger testified to informally telling Judge Morris, who was the presiding judge at defendant's trial, of Bevington's relationship with Harry Schmuck prior to Schmuck's appointment as defense counsel. Judge Morris, who also testified at the evidentiary hearing, reported a vague recollection of this conversation with Mr. Unger. Neither the prosecutor nor the judge testified to informing the defendants about Schmuck's relationship with Bevington.

There is no evidence in the record to indicate if the other judges who presided at defendants' trial, or the defendants, themselves, were informed about Schmuck's relationship with Bevington. This issue only arose after trial when defendants made a motion for a new trial based upon several factors, including the alleged inadequacy of counsel due to counsel's conflict of interest. Apparently at the trial of Battista, the restaurant owner, and Paone, the restaurant manager, held subsequent to the defendants' trial, the issue of Schmuck's prior relationship with Bevington came out during cross examination of Bevington. At the hearing on the motion for a new trial, the trial judge refused to take any testimony on the alleged conflict of interest.

Defendants' first assignment of error is:

> "1. The trial court erred in its findings of Fact and Conclusions of Law made by the trial court after the evidentiary hearing under Ohio Revised Code 2953.21(E), and that said Findings of Fact and Conclusions of Law are prejudicial to the rights of the defendant-appellants herein."

Upon our review of the record of the evidentiary hearing we find the findings of fact complained of by the appellant are not against the manifest weight of the evidence. These findings of fact are supported by some competent credible evidence. *C. E. Morris v. Foley Construction* (1978), 54 Ohio St. 2d 279. This assignment of error is not well taken.

Appellant's second assignment of error is:

> "The trial court erred in not granting the defendant-appellants a new trial after an evidentiary hearing under Ohio Revised Code 2953.21, when the evidence disclosed a conflict of interest between the defendant-appellants' chief counsel and a chief witness for the State during trial, which conflict violated the rights of the defendant-appellants under the Sixth Amendment and the Fourteenth Amendment to the United States Constitution, and deprived defendant-appellants of due process of law."

The test to be applied in determining whether a criminal defendant received effective assistance of counsel is set forth in *State v. Hester* (1976), 45 Ohio St. 2d 71, as follows:

> "4. The test in determining if the accused had effective retained counsel is whether the accused, under all the circumstances, including the fact that

> he had retained counsel, had a fair trial and substantial justice was done." *State v. Hester* at 71.

The requirement of the effectiveness of counsel at a criminal trial not only includes the issue of an attorney's competency in terms of such matters as filing pretrial motions, interviewing defense witnesses and adequately cross-examining prosecution witnesses, see, for example, *State v. Nabozny* (1978), 54 Ohio St. 2d 195, *State v. Lytle* (1976), 48 Ohio St. 2d 391, cert. granted, vacated and remanded on other grounds (1978), 438 U.S. 910, but also requires that an attorney represent no conflicting interests. See for example *Glasser v. United States* (1942), 315 U.S. 60, *United States v. Jeffers* (7th Cir. 1975), 520 F. 2d 1256, *Castillo v. Estelle* (5th Cir. 1974), 504 F. 2d 1243. Simultaneous representation by an attorney of a prosecution witness or a codefendant along with the criminal defendant can create conflicts of interest. See generally Annotation Propriety and Principal Effect of Counsel's Representing Defendant in Criminal Case Notwithstanding Counsel's Representation of Prosecution Witness. 27 ALR 3d 1431. Conflicting interests can exist even if the attorney has terminated his relationship with the prosecution witness. *Tucker v. United States* (9th Cir. 1956), 235 F. 2d 238. The failure of a defense attorney to conduct a vigorous cross-examination of a prosecution witness because of the attorney's relationship with the witness is one example of a possible prejudicial effect arising from a conflict of interest. *United States v. Jeffers, supra.*

Where a conflict of interest does exist a criminal defendant need not show specific prejudice. As was stated by the United States Supreme Court in *Glasser v. United States, supra,* a case involving an attorney's representation of more than one criminal defendant:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Cf. Snyder v. Massachusetts, 291 U.S. 97, 116; Tumey v. Ohio, 273 U.S. 510, 535; Patton v. United States, 281 U.S. 276, 292. And see McCandless v. United States, 298 U.S. 342, 347." *Glasser v. United States, supra,* at 76.

In the most recent United States Supreme Court opinion, considering the possible constitutional violation of a criminal defendant's sixth amendment right to counsel resulting from defense counsel representing more than one criminal defendant, the Court stated:

> "Glasser established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused 'to indulge in nice calculations as to the amount of prejudice' attributable to the conflict. The conflict itself demonstrated a denial of '[t]he right to have the effective assistance of counsel.' 315 U.S., at 76. Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See Holloway, supra, at 487-491. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. See Glasser, supra, at 72-75." *Cuyler v. Sullivan* (1980), 48 U.S. Law Week 4517 at 4521.

In examining the entire record we find evidence that a conflict of interest did exist in Mr. Schmuck's representation of the defendants when he had previously represented the prosecution witness George Bevington in

the same matter. This conflict of interest was known to the prosecutor and was informally communicated to one of the trial judges. There is no evidence in the record that the other two trial judges were aware of Mr. Schmuck's relationship with George Bevington. We also find no evidence of knowledge by the defendants of Attorney Schmuck's relationship with George Bevington until after the defendant's trial.

We also find Schmuck erred in not revealing to the court or to the defendants that prior to his appointment as defense counsel, Dalesandro attempted to retain Schmuck as defense counsel on the same charges the defendants faced. Schmuck's request that Borcoman cross-examine Dalesandro indicates Schmuck regarded a possible conflict of interest to exist.

Because we find a conflict of interest did exist in Schmuck's representation of the defendants, we find sufficient evidence of inadequacy of defendants' counsel without a requirement that defendants show specific prejudice resulting from Schmuck's conflicts of interest. *Cuyler v. Sullivan, supra.* This conflict of interest prevented a thorough pre-trial investigation and discovery of Bevington's activities, vigorous cross-examination of Bevington and resulted in a lack of trial procedures designed to show that Bevington was the alleged guilty party rather than the defendants who Attorney Schmuck was appointed to defend. This inadequacy of the defendants' counsel constitutes plain error and requires a new trial for the defendants.

On consideration whereof, the court finds that the defendants were prejudiced and prevented from having a fair trial and judgment of the Common Pleas Court of Stark County is reversed. This cause is remanded to

said court, for further proceedings according to law. Costs to abide final determination.

JUDGMENT REVERSED.

POTTER, BROWN and CONNORS, *JJ.*, concur.

JUDGE JOHN W. POTTER, JUDGE CLIFFORD F. BROWN and JUDGE JOHN J. CONNORS, JR., Sixth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

APPENDIX B

Ruling and Findings of Fact and Conclusions of Law of the Court of Common Pleas

(Filed July 13, 1979)

Case No. 76-6169

IN THE COURT OF COMMON PLEAS,
STARK COUNTY

STATE OF OHIO,
Plaintiff-Appellee,

vs.

MYRON LESTER TILTON and GARY EVERETT THOMPSON,
Defendant-Appellants.

RULING AND FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PETITIONS TO VACATE CONVICTIONS AND SENTENCES

On July 5, 1978, petitioners, Gary Everett Thompson and Myron Lester Tilton, each filed a Petition to Vacate Conviction and Sentence in the Stark County Common Pleas Court pursuant to R.C. 2953.21. The Court dismissed the petitions for post-conviction relief without an evidentiary hearing. On December 20, 1978, the judgments were reversed by the Fifth District Court of Appeals and the causes remanded for further proceedings according to law.

The ground for reversal, as expressed by the Court of Appeals was that the trial court failed to conduct an evidentiary hearing on appellants' contention that, at the

time of their trials, they had been denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments of the United States Constitution. The matter came before this court for purposes of such an evidentiary hearing on said allegation of ineffective assistance of counsel.

Prior to the hearing, this court granted a motion in limine, filed by the State of Ohio, to limit the hearing to the allegations of ineffective assistance of counsel. Counsel for petitioners agreed in open court to said motion of the State of Ohio.

A hearing on said allegations was held. Evidence was presented in behalf of Petitioners and counsel for both the Petitioners and the State of Ohio presented oral arguments to the court.

Petitioners allege they were denied the effective assistance of their chief defense counsel, Attorney Harry Schmuck, because of his "prior commitments" to a State's witness, George Bevington, and to the Prosecuting Attorney of Stark County, Ohio.

After hearing the evidence and the oral arguments of counsel, this court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. George Bevington was a friend of Attorney Harry Schmuck and had done work for Schmuck prior to the time in question.

2. Two days after the LaCuisina fire, Bevington learned from Fred Dalesandro that gasoline he (Bevington) had sold Dalesandro was used in the setting of said fire.

3. Bevington went the next day to see Attorney Schmuck in re the matter of his selling gasoline which was used in setting the LaCuisina fire.

4. Attorney Schmuck advised Bevington to tell the truth to the authorities.

5. Schmuck contacted assistant Prosecuting Attorney Don Benson and advised him Bevington had something to tell the Prosecutor.

6. Prosecuting Attorney James Unger took a statement from Bevington at Schmuck's office with Schmuck present. Schmuck was not given a copy of Bevington's statement.

7. At the time of the statement, Schmuck did not know of Bevington's meeting with Scott and Dalesandro.

8. Bevington's statement to the Prosecutor (Petitioners' exhibit nine) explained how Fred Dalesandro had approached him for large quantities of gasoline and how he had furnished some of the gasoline from his own supply of gasoline, as he had done before, and how he had purchased the rest of the gas at a nearby gas station for Dalesandro after his (Bevington's) supply had been exhausted. Bevington also related how Dalesandro had paid him in two checks for the gasoline he had purchased for him.

9. Nothing in Bevington's statement incriminated him in the setting of the LaCuisina fire.

10. Bevington was not indicted for any role in the LaCuisina fire.

11. Schmuck was not retained by Bevington from the time of Bevington's statement to Unger until he represented him, subsequent to the trial of Tilton and Thompson, in a lawsuit brought by the widows of the three

firemen, in which Bevington was named as a party defendant.

12. After Thompson and Tilton were indicted for aggravated murder (three counts), Attorney Tom Borkman, Public Defender of Stark County was appointed to represent Tilton and Thompson.

13. Tilton and Thompson requested the appointment of Attorney Harry Schmuck as co-counsel and he was appointed.

14. Neither Schmuck nor Unger advised the court of Schmuck's relationship to Bevington or their earlier conversations in re the LaCuisina fire.

15. Schmuck did not advise Tilton and Thompson of his earlier relationship with Bevington.

16. Prior to trial, Schmuck discussed with co-counsel Borkman what Bevington would testify to since he knew Bevington and had discussed the matter with him. He did not tell Borkman of Bevington's statement to Unger, or that Bevington was a former client.

17. Prior to trial, Schmuck discussed Bevington's expected testimony in presence of Tilton and Thompson. They knew that Schmuck knew Bevington and what he would say as a witness.

18. Bevington testified at the trial of Tilton and Thompson for the State of Ohio. His testimony was about how he sold the gasoline to Dalesandro. He did not testify as to any involvement of Tilton and Thompson in setting the LaCuisina fire.

19. Schmuck cross-examined Bevington at the trial. His cross-examination was limited to the area of Bevington's sale of the gasoline to Dalesandro.

20. Borkman cross-examined Dalesandro, who also testified for the state.

21. There was no specific arrangement between Schmuck and Borkman as to who would cross-examine Bevington.

22. After the trial of Tilton and Thompson, Schmuck represented Bevington in a lawsuit brought by the widows of the three firemen naming Bevington as a party defendant.

CONCLUSIONS OF LAW

1. "In formulating a test for effective assistance of counsel pursuant to the Fifth, Sixth, and Fourteenth Amendments, and Sections 10 and 16 of Article I of the Ohio Constitution . . . we hold the test to be whether the accused, under all the circumstances, including the fact that he had retained counsel, had a fair trial and substantial justice was done." *State v. Hester* (1976), 45 Ohio St. 2d 71, 79.

2. "When considering an allegation of ineffective assistance of counsel, a two step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness." *State v. Lytle,* 48 Ohio St. 2d 391.

3. "Undivided loyalty of appointed counsel to his client is essential to due process." *Castillo v. Estelle,* 504 F. 2d 1243.

4. "Where a conflict of interest of appointed counsel is real, a denial to defendant of his right to effective representation exists, without a showing of specific prejudice." *Castello v. Estelle, supra.*

5. At the time of Attorney Harry Schmuck's appointment by the Court to represent Petitioners, his relationship to George Bevington did not constitute a conflict of interest as to representing said Petitioners. Bevington was not a client of his at the time Schmuck was appointed, at their request, to represent the Petitioners.

6. During the trial of Petitioners, the testimony of George Bevington, as to his sale of gasoline to Fred Dalesandro, did not raise any conflict of interest for Attorney Schmuck in his defense of Petitioners. Bevington at no time testified as to the guilt of Petitioners.

7. The fact that Schmuck had represented Bevington in the past does not per se create a conflict.

8. As to counsel's effectiveness during trial, the Petitioners have the burden of proof since in Ohio a properly licensed attorney is presumably competent. *State v. Lytle,* 48 Ohio St. 2d 391.

9. Counsel must render "reasonably effective assistance". *Beasely v. United States* (C.A. 6, 1974), 491 F. 2d 687, 696.

10. Nothing in the record indicates a violation of any of defense counsels' essential duties to his client.

11. Due to the above conclusion of law, there is no need to determine whether the defense was prejudiced by any alleged ineffectiveness.

Based upon the facts and law set forth above, this Court concludes that Petitioners have not carried their

burden of proof that Attorney Harry Schmuck violated any essential duty to his clients, the Petitioners.

In accordance with *State v. Hester,* 45 Ohio St. 2d 71, this court concludes the Petitioners had a fair trial and substantial justice was done and therefore the court concludes they had the effective assistance of counsel.

Petitioners' Petition for Post-Conviction Relief overruled.

ROBERT E. COOK, *J.*

JUDGE ROBERT E. COOK sitting by assignment from the 11th Appellate District.

APPENDIX C

Order of the Supreme Court of Ohio Overruling Motion for Leave to Appeal

(Dated September 26, 1980)

No. 80-1074

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO
City of Columbus.

STATE OF OHIO,
Appellant,

vs.

MYRON LESTER TILTON *et al.*,
Appellees.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS
for STARK County

It is ordered by the Court that this motion is overruled.

DOWD, *J.*, not participating.